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Issue Date: 23 September 2003

CASE NO.: 2003-LHC-32

OWCP NO.: 8-116270

IN THE MATTER OF

SAMUEL ALVAREZ
Claimant

v.

TEXAS DRYDOCK, INC.,
Employer

and

RELIANCE NATIONAL INDEMNITY CO.,
Carrier

APPEARANCES:
Ed Barton, Esq.
John McElroy, Esq.
For Claimant

Dennis Sullivan, Esq.
Kenneth Baird, Esq.
For Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Samuel Alvarez

(Claimant) against Texas Drydock, Inc., (Employer) and Reliance National Indemnity Company (Carrier). The formal hearing was conducted in Beaumont, Texas on May 19, 2003. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-12 and Employer's Exhibits 1-14, 16-20, with the exception of page 14 of Employer's Exhibit 20, and Employer's Supplemental Exhibits 1-2. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows [3]:

1. The injury/accident occurred on February 19, 1999;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on February 19, 1999;
5. A Notice of Controversion was filed November 11, 1999 and February 28, 2003;
6. An informal conference was held on December 27, 1999, March 15, 2001, and June 26, 2002;
7. The average weekly wage at the time of injury was $539.15;
8. Employer paid Claimant benefits including temporary total disability from April 29, 1999, to August 8, 2002, at $359.43 per week; and
9. Medical benefits have been paid through May 6, 2001.

[1] The parties were granted time post hearing to file briefs. This time was extended up to and through August 1, 2003

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__". Claimant's Exhibits 11-12 and Employer's Supplemental Exhibits 1-2 were filed post-hearing by agreement of the parties

[3] The stipulations of date of injury and maximum medical improvement are as to Claimant's back injury only. The Employer alleges that the neck and arm injuries are not at all related to the February 19, 1999 accident (JX 1).

Issues

The unresolved issues in this proceeding are:

1. Causation of alleged cervical condition
2. Nature & Extent of alleged cervical condition;
3. § 7 Medical benefits;
4. Penalties and Interest; and
5. Attorney's Fees.

Statement of the Evidence

Testimonial and Non-Medical Evidence

Claimant was born in Guatemala City, Guatemala, and moved to the United States in 1969. Claimant has been an American citizen for three years. He reads and writes Spanish, and explained that he reads more English than he can write.[4] As technician and repairmen for Employer, Claimant was expected to repair the welding machines, and occasionally go to the vessels or rigs and repair the welding cables, as well as the gun of the welding machine and several other components (TR 36).

On February 19, 1999, Claimant picked up a MIG welding machine which needed to be repaired. He underestimated its weight and when he went to lift it up to place it on a repair table he heard a popping in his back. Claimant explained that he felt pain in his arms and neck for the remainder of the day, but his lower back pain was more painful (TR 37). Three days later, Claimant was sent to Dr. Lance Craig, one of Employer's physicians. Dr. Craig released Claimant to full duty that same day, and Claimant continued to work until the Monday preceding his scheduled back surgery (TR 38).[5]

Claimant returned to the Tower medical Center, on March 3, 1999, and saw Dr. Carlton Tyrrell. Claimant testified that he told Dr. Tyrrell of the numbness and tingling in his arms as well as the neck pain he was experiencing (TR 61-62). Claimant then saw Dr. Craig once more, and had an MRI on his lower back which prompted Dr. Craig to recommend Claimant see Dr. Alvin Larkins for a second

[4] An interpreter was provided for Mr. Alvarez at the formal hearing because he is more comfortable speaking Spanish, in spite of the fact he speaks quite a bit of English.

[5] Claimant worked full duty from February 19 to March 8, 1999, and then light duty from March 9 until his surgery on April 29, 1999 (TR 38-39, EX 13, p. 80).

opinion. Dr Larkin recommended surgery (TR 40). Employer asked that Claimant see Dr. Martin Haig for another surgical opinion.

Dr. Haig first saw Claimant on April 19, 1999. After examining Claimant he agreed that Claimant needed lumbar surgery and recommended Dr. Carl Beaudry as a surgeon whom he would assist in performing the lumbar laminectomy. At that time, Dr. Haig also noted that Claimant complained of some numbness in his arm, and Claimant testified that he told Dr. Haig of a pain in his neck (TR 41, 66). Claimant also testified that he told Dr. Larkins of the pain in his neck. At the formal hearing, Claimant explained that since that time his left arm had become increasingly difficult to raise, and his right arm becomes numb, and he can only raise it with pain.

Following the April 29, 1999, back surgery, Claimant's pain almost completely resolved itself (TR 44). Claimant continued to see Dr. Beaudry, who had become his primary treating physician (TR 66), and whom he agreed was a good doctor (TR 70). Claimant explained that when he saw Dr. Beaudry he may not have specifically pointed at his neck when he described the pain inflicting his whole body. However, by way of explanation, he stated that the pain he suffered at the time of the formal hearing was much more severe than the neck pain was immediately following the surgery (TR 67).

Claimant stated that he experiences increased pain when he turns his body, if he lifts objects, and when the car bounces while he is driving (TR 45). He also explained that the increase in pain, and consequently his ability to lift his arms, varies greatly with the weather (TR 68). Claimant also testified that the residual pain in his back, as well as the pain in his arms and neck, has prevented him from sleeping (TR 64, ll. 2-3). Claimant currently takes Lortab for the pain (TR 47). Claimant also testified that if there was a job he could perform and earn money he would go back to work, providing he could sleep on the days in which he had slept poorly the night before (TR 47-48). He stated that he would not be able to go to work everyday because of the numbness and pain that he experiences (TR 48).

Claimant testified that he had worked at the High Dock Factory, a wheels and casters factory in Chicago, Illinois, between 1970 and 1977 where, at various times, he drove a forklift and held a foreman's position. In Claimant's deposition testimony he stated that he could attempt to drive a forklift, however, at the formal hearing, he stated that he would not be able to drive a forklift. In further explanation, he clarified that he could attempt to sit on the forklift, but he knows that he would have to twist his body to operate it, which would cause pain and

affect him greatly, and therefore, he could not drive a forklift all the time. Claimant had also stated in his deposition that he would be able to perform the job of a foreman at a similar factory, but at the hearing, Claimant stated he would not be able to do a foreman's position in his present condition (TR 55). By way of explanation, Claimant again referred to sleepless nights due to pain which would render him unable to do any job, including that of a foreman.

Wallace Stanfill is a vocational rehabilitation counselor whose deposition was taken post hearing and, along with his May 6, 2003 report, is part of Employer's Supplemental Exhibit 1. Mr. Stanfill did not personally interview Claimant, but based on Claimant's deposition, medical records, and doctors' depositions, he was able to ascertain sufficient information to perform a labor market survey for suitable alternative employment for Claimant.[6] Mr. Stanfill used Dr. Beaudry's restrictions to find medium duty work for Claimant.

Mr. Stanfill identified 5 jobs that he felt were suitable alternative employment, considering Claimant's education, employment history, geographical location, and Dr. Beaudry's physical restrictions for Claimant (summarized by Mr. Stanfill as "medium", EX 14, p. 4), that were available on May 6, 2003. The first job he identified was an "apartment make-ready worker" with Key Staff Agency in Beaumont, Texas, paying $5.50/hr. He described the job as going into vacant apartments and cleaning the carpets, patching the sheetrock, painting and cleaning. Mr. Stanfill felt that this job was within Claimant's restrictions (EXS 1, p. 27, ll. 25). The second job was an "office cleaner" with American Building Maintenance in Beaumont, Texas, paying $6.00/hr. This job included cleaning public areas, emptying trash cans, dusting, and vacuuming. He felt this was also within Claimant's restrictions (EXS 1, p. 28). The third job identified by Mr. Stanfill was a "utility worker" at the Golden Corral in Jasper, Texas, paying $5.50-$6/hr. This restaurant needed an all-around kitchen person and prep cook, who would also clean up the dining area.[7] Mr. Stanfill felt that Claimant could perform this job as well (EXS 1, p. 29).

[6] Mr. Stanfill explained that it is not uncommon for him not to meet with the client, in spite of the fact that a better understanding of a claimant's background or sympathetic view point could be gained, because it was not a critical step in the process of preparing a labor market survey (Employer's Supp. EX.1, p. 61)

[7] The restaurant manager asked Mr. Stanfill if Claimant was interested in **relocating** to Jasper. On cross-examination, Mr. Stanfill agreed that Jasper, Texas, is a significant distance from Claimant's home in Port Arthur, Texas, approximately 90 miles, and although it was by no means an "ideal" job he still felt it was "suitable."

The fourth job identified by Mr. Stanfill was a "kitchen helper" at the Waffle House in Orange Texas, paying $5.45/hr. Mr. Stanfill felt that Claimant could perform that job (EXS 1, p. 35). The fifth and final job identified by Mr. Stanfill was a "dietary worker" at Green Acres Development Center in Bridge City, Texas, paying $5.62/hr. He explained that this job was remarkably similar to a kitchen helper or prep cook, and Claimant would be expected to set up and deliver trays to patients that were confined to their rooms.[8]

William Kramberg is a vocational rehabilitation counselor, whose deposition is Claimant's Exhibit 11, and report of June 11, 2003, is Claimant's Exhibit 12. Both were prepared post-hearing at the agreement of the parties. Mr. Kramberg examined Mr. Stanfill's report, interviewed Claimant personally, as well as reviewed many of the relevant medical and testimonial evidence. He offered his expert opinion on Claimant's ability to perform the identified jobs. Mr. Kramberg administered several diagnostic tests in an effort to determine Claimant's academic and intellectual ability.[9] Mr. Kramberg opined that Claimant would be academically and intellectually capable of performing all the jobs identified in the labor market survey performed by Mr. Stanfill (CX 11, p. 12).

Mr. Kramberg identified two problems with the labor market survey and the specific jobs offered as alternative employment. Namely, that the jobs were either unavailable or exceeded Claimant's physical restrictions as identified by Dr. Beaudry in his deposition on pages 12-15, and 20-22, which were restrictions as to Claimant's back injury only.[10] In explaining the restrictions identified by Claimant's treating orthopedist, Mr. Kramberg stated that Claimant did not fit neatly into the categories identified by the Dictionary of Occupational Titles (DOT), because although he had the ability to lift up to 50 lbs. occasionally, which would classify him as a medium worker, however, he was restricted from doing

[8] Employer also agreed that Claimant is able to perform work as the operator of a forklift, based on his deposition testimony. However, Claimant denied at trial his ability to perform such a job, and Employer neglected to state whether any of these jobs are actually *available* within Claimant's geographical area.

[9] Mr. Kramberg determined that Claimant could spell and perform mathematics on a 5th grade level, his reading skills were on the high school level, and his reading comprehension, although slow, was on a ninth grade level.

[10] Claimant's neck had been assigned a 0% impairment rating, or in the alternative restricted Claimant from jobs which would require hyper –extension of flexion, none of which were a problem in the jobs listed.

any repetitive lifting, even of as little as 5 lbs., which would be a light or sedentary worker (CX 11, p. 22).

Mr. Kramberg contacted the jobs listed by Mr. Stanfill and found that the Golden Corral was located almost 90 miles from Claimant's home in Port Arthur, TX, and therefore, he did not feel the commute was reasonable for a worker being offered $6 an hour. Mr. Kramberg instead evaluated the other 4 jobs listed. After speaking with Sherry at the contact number provided, Mr. Kramberg ascertained that the position as an apartment make-ready worker required Claimant to work on his knees, as well as bend and stoop. Mr. Kramberg also testified that Claimant would be required to lift 20 lbs. repetitively. Furthermore, the employer was not an apartment complex, but rather a labor service provider, offering only temporary positions, or seasonal employment (CX 11, p. 24, 76).

Mr. Kramberg spoke with Candace at American Building Maintenance about the position as an office cleaner. Mr. Kramberg testified that this was described as a "physical job," with constant standing and walking, as well as the requirement of lifting 25 lbs. repetitively (CX 11, p. 25). The hours available varied between 10-17 hrs per week. The third job which Mr. Kramberg investigated was the "kitchen helper" position at Waffle House. Mr. Kramberg explained that he spoke with Dennis, and was informed that there was no such position; however there was either a "cook" or "waiter". Both positions required lifting between 20-40 lbs repetitively.

The fourth and final position examined by Mr. Kramberg was the cook/dietary worker at the Green Acres Development Center where he spoke with Dorothy Bland (CX 11, p. 29). The position would require Claimant to cook, clean, and wash dishes, including lifting 20 lbs. repetitively, and was available on in June 2003 according to Mr. Kramberg's information. Claimant would be expected to be on his feet all day, except for times he was given for designated breaks.

Mr. Kramberg was unable to be specific about what he considered to be "repetitive" lifting, and whether that would be occasional or frequent or constant according to the DOT. He furthermore noted that he relied on the restrictions outlined by Dr. Beaudry, as oppose to those limitations reported by Claimant himself (CX 11, p. 93). He also stressed that Claimant would have to be able to perform the essential functions of any position before accommodations could be made regarding non-essential functions (CX 11, p. 92). Mr. Kramberg opined that none of the 5 jobs listed in Mr. Stanfill's report were suitable (CX 11, p. 31).

Medical Evidence

Dr. Carl Beaudry is a board certified orthopedic surgeon. His deposition is Claimant's Exhibit 2, and his medical records are Claimant's Exhibit 3. Dr. Beaudry began treating Claimant on April 19, 1999, at the request of Dr. Haig, who had been seeing Claimant for complaints of lower back pain, and right-sided sciatica.[11] Dr. Haig asked Dr. Beaudry to perform a clinical examination as well as review an MRI. Dr. Haig felt that Claimant's history, as well as the diagnostic findings, indicated that he was a candidate for a laminectomy and discectomy. Dr. Beaudry agreed, and Dr. Haig requested that Dr. Beaudry proceed with the surgery (EX 2, p. 8). Claimant did not complain of cervical pain, but Dr. Beaudry noted that Claimant had complained to Dr. Haig of some pain in his upper right extremity (EX 2, p. 8), which Dr. Haig found to be "inconsistent" (CX 2, p. 35-36). Dr. Beaudry stated that if there had been any indication of a neck condition when Claimant first came to him, he would have addressed it (CX 2, p. 36).

After diagnosing Claimant with a herniated disc at L4-5, Dr. Beaudry performed lumbar surgery on April 29, 1999, at Park Place Medical Center in Port Arthur, Texas. Claimant's laminectomy and discectomy at the L4-5 disc space were successful. The herniation had been in the midline, mostly to the right side, and therefore, pain extended into the posterior thigh, anterior leg, and foot. Dr. Beaudry opined that there is the possibility for reoccurrence, because the removal of a disc or a portion of a disc will cause the disc space to collapse which allows for a greater potential of recurrent nerve root irritation because of a narrowing of the space (CX 2, p. 11).

Dr. Beaudry saw Claimant monthly for the first two years following his surgery, and at least every three months since then. Dr. Beaudry felt the surgery was a success. However, he also felt that Claimant would be unable to return to his pre-injury employment, and should avoid twisting, heavy lifting (more than 50 lbs.), repetitive lifting of any weight, and bending (EX 2, p. 12-13, 22). Dr. Beaudry added that prolonged sitting will often exacerbate Claimant's back problem. Specifically, Claimant could sit for up to 2 hours at a time, and then he should change positions or walk around.

[11] Dr. Haig and Dr. Beaudry practice in the same office, and when one or the other is unavailable they will treat each other's patients. Dr. Haig assisted Dr. Beaudry in performing Claimant's surgery (CX 2, p. 30). Dr. Beaudry reviewed Dr. Haig's notes, and personally discussed the case with his colleague. Dr. Beaudry explained that he respects Dr. Haig as an orthopedic surgeon and personal friend. However, in spite of their professional and personal relationship over the past 27 years, they do disagree about certain cases, as they did in this instance (CX 2, p. 56)

Dr. Beaudry surmised that Claimant could drive a vehicle or a truck, as long as he was not expected to unload the vehicle (CX 2, p. 15). Dr. Beaudry thought that Claimant would be released to work following a good functional capacity evaluation and work-hardening program, specifically relating to Claimant's lower back (CX 2, p. 22). Dr. Beaudry felt that Claimant had reached maximum medical improvement for his back condition; however, he failed to identify a date because of concurrent cervical problems. He agreed that if there was no further treatment for the neck or back then Claimant would be at maximum medical improvement for both (CX 2, p. 15-16).

Claimant first complained to Dr. Beaudry of cervical pain on July 19, 1999, stating that he had on-going pain and stiffness over his cervical spine with pain radiating into both upper extremities, especially on the right side and resulting in numbness in all of his fingers (CX 3, 221, CX 2, p. 37, 43). On September 20, 1999, Dr. Beaudry opined that Claimant remained temporarily totally disabled from returning to his regular duties, and his main complaint was of pain over his cervical spine with accompanying paracervical muscle spasms (CX 3, p. 217). Claimant continued to complain of mild pain in his lower back, and Dr. Beaudry advised that Claimant limit his physical activities to walking and continue to refill the Vicodin and Celebrex prescriptions (CX 3, p. 217) On October 18, 1999, Dr. Beaudry felt that Claimant was capable of starting a program of physiotherapy rehabilitation and work hardening (CX 3, p. 216), which he began on November 10, 1999 at the Bone and Joint Physical Therapy Clinic with Jeanette Garner (CX 3, p. 214). In December 1999, Claimant was instructed to continue with ongoing rehabilitation and refill his medication, but there was no significant changes noted (CX 3, p. 213).

On January 24, 2000, and March 8, 2000, Claimant complained to Dr. Beaudry of pain and stiffness over his cervical spine with radiation into lower extremities and accompanying numbness, as well as continuing lumbar pain in spite of conservative treatment (CX 3, p. 209). Claimant was not released to work.

In February 2000, Dr. Stephen Esses, at the behest of the U.S. Department of Labor, examined Claimant and determined that the cervical complaints could reasonably be related to the February 19, 1999, accident and that he should undergo a cervical evaluation (CX 3, p. 207). Dr. Beaudry confirmed a diagnosis of degenerative disc disease and small anterior osteophytes at C5-6 with x-rays of the cervical spine (CX 3, p. 201, 198); however, an MRI of the cervical spine, on May 8, 2000, was found to be grossly within normal limits.

As of May 18, 2000, Claimant remained totally disabled from returning to his regular duties. Dr. Beaudry continued to maintain in September 2000 that Claimant would not reach maximum medical improvement until he had been treated for his cervical condition, specifically with physiotherapy (CX 3, p. 190).[12] Claimant's range of motion in his cervical spine was 80% of normal and in January and February 2001 Claimant's cervical condition continued to worsen (CX 3, p. 168). Then from March 2001 through April 2003, Claimant's condition was relatively unchanged.[13]

Dr. Beaudry opined that Claimant's condition had been aggravated by the February 19, 1999 accident (CX 2, p. 16, ll. 23-25). Dr. Beaudry believes that physiotherapy and/or epidural steroid blocks could treat Claimant's cervical condition, and relieve the pain, and therefore, are both reasonable and necessary (CX 2, p. 17). Since Claimant's lumbar surgery, Dr. Beaudry has been prescribing pain medications for Claimant's lower back, which he believes had in effect been treating the cervical pain as well.[14]

Claimant was last seen by Dr. Beaudry on April 2, 2003, when Claimant complained of pain over his lower back with some occasional radiation into his right leg. Claimant complained primarily of stiffness in his neck and occipital headaches, which are headaches localized over the posterior aspect of the skull and can be attributed to neck problems (CX 2, p. 19). Dr. Beaudry stated that in addition to the restrictions for Claimant's back, he would add that due to Claimant's neck problems he should avoid activities which require prolonged hyperextension of the neck or even hyperflexion, *ie*. overhead work on a daily or hourly basis (CX 2, p. 20-22).

Dr. Beaudry expressed the desire to further treat Claimant's cervical condition. Namely, he would like to obtain an electromyelogram of Claimant's upper extremities and a CAT scan of the cervical spine, and get a second opinion from a neurosurgeon, to ascertain whether there is any evidence of nerve root compression (CX 2, p 23). The neurosurgery consult would only be needed depending on the Claimant's progress, as Dr. Beaudry explained that he does not

[12] Claimant's primary complaint continued to be his cervical pain with radiation into both of his shoulders and numbness in his upper extremities (CX 3, p. 174)

[13] There were March 29, 2001, May 15, 2001, and June 18, 2001 appointments in which Dr. Beaudry noted no change to Claimant's condition.

[14] Dr. Beaudry stated that the medication prescribed has the effect of making Claimant drowsy or dizzy, which means it is not a good idea to take the medication while driving or at work (CX 2, p. 18).

perform cervical surgery. Dr. Beaudry felt that Claimant's complaints were consistent with a spinal stenosis, which is essentially a pinched nerve due to a disc problem and was not negated by a normal MRI.

Dr. Beaudry felt that the disc disease was aggravated by the traumatic injury, but could not say that Claimant's degenerative disc disease was exclusively caused by his accident on February 1999 (CX 2, p. 48).[15]

Dr. Stephen Esses, the Brodsky professor of clinical orthopedic surgery and spine surgery at Baylor College of Medicine in Houston, Texas, examined Claimant on January 20, 2000 (EX 16, p. 3-5). Claimant told Dr. Esses that approximately two weeks following his surgery he developed numbness in his right and left arm which he did not initially attribute to his accident. Examination of Claimant's back showed a well-healed scar, but examination of his neck indicated no point tenderness, but instead some paravertebral spasms. It was Dr. Esses' opinion that Claimant's symptoms of neck and arm pain were from his February 19, 1999 accident, and felt it would be reasonable to allow Claimant to undergo further cervical evaluation (CX 5, p. 2).

Dr. Esses' letter dated July 25, 2000, stated that he had read the MRI and was in agreement with Dr. Beaudry that the MRI showed as "grossly normal" (CX 2, p. 46). He also noted that the interpretation of an MRI scan showed small anterior osteophystes at C5-6, but no nerve root compressions. Dr. Esses agreed with Dr. Haig that Claimant's neck injury warranted a 0% impairment rating (EX 16, p. 6).

On April 2, 2001 (EX 16, p.8), Dr. Esses again examined Claimant and found significant non-organic findings, which means Claimant was complaining about symptoms that could not be qualified by a classical physical finding (EX 16, p. 8, CX 2, p. 51). At that time Dr. Esses opined that Claimant was at maximum medical improvement with a 0% permanent impairment for his neck, and he felt that no further cervical treatment was necessary.

Dr. Lance Craig first saw Claimant on February 22, 1999. His deposition is Employer's Exhibit 13. Dr. Craig is not board certified and testified that his specialty is occupational medicine, which deals specifically with the care of

[15] Dr. Beaudry held this opinion in spite of the five month delay in the manifestation of symptoms, during which time he had no indications that Claimant might be suffering with a neck problem.

injured workers.[16] Dr. Craig examined Claimant on two occasions, February 22, 1999, three days following the accident, and March 8, 1999. In between the two visits Claimant had an MRI, on March 5, 1999. Dr. Craig stated that if Claimant had complained of any additional pain, beyond the stated back pain, he would have recorded the complaints (EX 13, p. 20). There were no x-rays taken of Claimant's neck, namely because Claimant did not complain of neck symptoms (EX 13, p. 22). Dr. Craig also opined that if Claimant had degenerative disc disease and it had been aggravated by a traumatic event, then symptoms would have been immediately apparent (EX 13, p. 37). He further opined that he had never seen a patient experience a traumatic accident, then allow five months to pass without recorded complaints, and consequently develop a condition that was related to the event.

Dr. Martin Haig is an orthopedist whose records are Employer's Exhibit 5. Dr. Haig first examined Claimant on April 19, 1999. After examining Claimant, and studying the MRI which had been taken the preceding month, he determined that Claimant needed to have a lumbar laminectomy immediately (EX 5, p. 11-12). In Dr. Haig's letter dated February 16, 2000, he explained that he had reviewed Dr. Esses and Dr. Larkin's reports, as well as being aware that the surgery had been performed. He opined that in spite of Dr. Esses opinion of the necessity of a further neck examination, Dr. Haig stated that at "no time did [he] ever find any serious neck problem here that would come close to warranting neck surgery" (EX 5, p. 7). Dr. Haig then wrote a letter dated February 5, 2001, in which he explained that as of June 19, 2000, he believed that Claimant's neck was at MMI with a 0% impairment based on an MRI of the cervical spine taken May 8, 2000, and therefore, Claimant needed no further treatment for his neck (EX 5, p. 5).

Dr. Alvin Larkins examined Claimant once on March 12, 1999, at the Beaumont Bone and Joint Institute. He examined Claimant, diagnosed a herniated disc at L4-5 on the right, and recommended a laminotomy diskectomy at that same level (EX 4, p. 3).

[16] Dr. Craig founded Tower Medical Center in 1999 which treats maritime petroleum workers. His experience is primarily in emergency medicine, and he further clarified that he is not an orthopedic surgeon, but insisted that his concentration in occupational medicine requires that he know when to refer a patient to an orthopedic surgeon (EX 13, p. 10-15).

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003), *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on February 19, 1999 during the course and scope of Claimant's employment. I find that Claimant suffered a lumbar disc injury and the existence of working conditions which could have caused that harm have been

shown to exist, and I accept the parties' stipulation. Claimant clearly injured his back while lifting the MIG welding machine. The extent, duration and disabling effects of that injury, however, are in issue.

Claimant additionally argues that he has invoked the presumption proving that his cervical condition is also related to his February 19, 1999 accident. I agree. Claimant suffers from a degenerative cervical disc condition which according to Dr. Beaudry was aggravated by his February 19, 1999, accident. Dr. Esses and Dr. Haig, as well as Dr. Beaudry, agree that Claimant suffers from degenerative cervical disc disease, and Claimant stated at the formal hearing that he had been suffering from whole body pain, including neck and arm pain from the time of the injury through the present.[17] Some early diagnostic studies supported Claimant's complaints of pain in his neck, and according to Dr. Esses and Dr. Beaudry, the February 1999 accident could have caused the cervical condition. There is sufficient evidence to invoke the presumption.

Employer argues that even if the presumption was invoked it has been rebutted, pointing to the lateness of Claimant's complaints as evidence that his testimony is self-serving and lacks credibility. Employer argues that the April 19, 1999, complaints of right arm numbness were an anomaly and labeled by Dr. Haig as "inconsistent", and therefore, the July 19, 1999 complaints to Dr. Beaudry were the first true record of cervical complaints. Also, Dr. Craig opined that it would be very unusual for related trauma to have symptoms appear 5 months following the event. Employer puts forth the above evidence both as a means of showing that Claimant failed to establish the requisite tenets of causation or, alternatively, as a means of rebutting the presumption.

I find that Employer's evidence is not sufficient to rebut the presumption of causation. Although they make an effort to dismiss Claimant's complaints to Dr. Haig as "insufficient" I disagree. Claimant's initial complaint of arm numbness came only two months following his accident, and then again in July 1999, five months following the accident. Although Dr. Haig dismissed the complaint in April as inconsistent which seems to assume that Claimant's identified problem was limited to his lumbar spine. Dr. Esses and Dr Beaudry both included Claimant's complaints to Dr. Haig in their understanding of the history of Claimant's cervical condition. In April 1999, there had been no diagnostic tests of Claimant's cervical region with which the complaints of arm numbness *could have*

17 Claimant argues that he had complained of arm and neck pain following the accident and he was at a loss to explain why his physicians had not recorded the complaints.

been consistent; therefore, I am unimpressed with Dr. Haig's dismissal as "inconsistent."

Dr. Esses and Dr. Beaudry felt that the cervical condition was related. In view of that, the delayed complaints of cervical symptoms are not sufficient to rebut the presumption. Neither is the statement from Dr. Craig, that the cervical injury would be unlikely to be related because it arose 5 months following the accident, sufficient to rebut the presumption of causation. Dr. Craig is not an orthopedist, whereas, Dr. Beaudry performs spinal surgeries and Dr. Esses is a professor of spinal surgery. Both doctors are in a better position to make the assessment of the causal relationships of orthopedic problems. Consequently, I give more weight to their opinions than that of Dr. Craig who only saw Claimant twice, very shortly after the incident, is not board certified, nor claims any specialty directly relevant to Claimant's cervical problems. Although he has experience in emergency medicine and occupational medicine, neither is as relevant as the specialties of Drs. Beaudry and Esses.

In sum, I find that the prima facie case is made by Claimant's own testimony and that of Drs. Esses and Beaudry, and thereby invokes the presumption of causation, which was not rebutted either by the chronology of the complaints or the testimony of Dr. Craig. Therefore, I find that Claimant's cervical condition, as well as his lumbar condition, is related to his February 19, 1999 accident.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994);

Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Dr. Beaudry stated that Claimant's lumbar condition had reached maximum medical improvement; however, he failed to state a specific date (EX 2, p. 15, CX 3, p. 175).[18] However, in looking at Dr. Beaudry's medical records it is apparent that following the office visit on July 19,1999, Claimant complaints were primarily related to his neck while at the same time Claimant's back pain remained constant and unchanged. Following July 19, 1999, I find that Claimant's back condition had received the maximum benefit of medical treatment, and Claimant's back did not significantly improve or worsen, receiving the benefit of treatment only to maintain, not improve, his condition.[19] Therefore, based on the medical records, I find that Claimant's lumbar back condition reached maximum medical improvement on July 19, 1999.

Both Dr. Esses and Dr. Haig agreed that Claimant's cervical condition had reached maximum medical improvement by June 19, 2000 (EX 5, p. 5-6, EX 7, p. 2-5). Initially, Dr. Beaudry felt that Claimant's condition needed to be further evaluated, and therefore he did not feel that Claimant had reached maximum medical improvement for his neck. However, there were no definitive physical findings which would support his opinion, only Claimant's complaints of ongoing pain. Analysis of the MRI, lead to a 0% impairment rating, and a finding that no further treatment was required. Both Dr. Esses and Dr. Haig examined Claimant's medical history as well and performed a physical examination, and I find that the opinions of Dr. Esses, the independent medical examiner, and Dr. Haig, a respected orthopedist, to be persuasive. Therefore, I find that Claimant's cervical condition had reached maximum medical improvement June 19, 2000.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir.

[18] Neither Dr. Haig nor Dr. Esses provided a date of maximum medical improvement for the lumbar condition either.

[19] Claimant went through a work hardening program for his back on October 18, 1999 (CX 3, p. 216-219), which is an indication that his back had healed as much as could be expected

1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

In order to establish suitable alternative employment, an employer must show Claimant is capable of working, even if it's within certain medical restrictions, and there is work within those restrictions available to him. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). Where the employer withdraws its light duty job, for example if Claimant was laid off, the burden of establishing subsequent, suitable alternative employment remains with the employer. *Mendez, supra*.

Claimant is obligated to take employment within his physical restriction and Employer is responsible for the difference between Claimant's new weekly wage and his former weekly wage. When suitable alternative employment is shown, the wages which the new positions would have paid at the time of Claimant's injury are compared to Claimant's pre-injury wage to determine if he has sustained a loss of wage earning capacity. *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330 (1990). Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2nd Cir 1991). The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Devillier v. National Steel and Shipbuilding*, 10 BRBS 649, 660 (1979).

Claimant has made a *prima facie* case for total disability, based on his back condition, and his resultant inability to return to his job as a technician repairman. Employer argues that Claimant is capable of returning to his former position based on the fact that Claimant worked immediately following his injury. However, that ignores the fact that Claimant was never returned to work by Dr. Beaudry *following the back surgery*. Dr. Beaudry felt the surgery was a success; however, he also felt that Claimant would be unable to return to his pre-injury employment (EX 2, p. 12-13, 22). Since Claimant's previous job as a technician repairman falls

outside of Dr. Beaudry's restrictions, Claimant remains unable to perform his former employment in spite of the handful of weeks he worked following his injury.

In sum, I find that Claimant was temporarily totally disabled from April 29, 1999, the date of his back surgery, until July 19, 1999, the date of maximum medical improvement for his back, at which time he continued to be temporarily totally disabled due to the fact that Claimant was not released to perform his former employment as technician repairman because of his emerging cervical condition.

While Claimant received treatment and evaluation for his cervical condition, he remained temporarily totally disabled from July 19, 1999, when Dr. Beaudry felt that although Claimant's lumbar condition had stabilized his cervical injury became disabling, until June 19, 2000, the date his cervical condition reached maximum medical improvement. Thereafter, I find Claimant remained permanently totally disabled until May 6, 2003, when employment opportunities were identified that were within the restrictions set out by Dr. Beaudry.

Claimant argues that the jobs identified by Mr. Stanfill's labor market survey were unsuitable, I disagree. In spite of Mr. Kramberg's assessment of the jobs identified, I find that Claimant would have been able to perform at least one of the jobs identified by Mr. Stanfill.[20] Specifically, I find that Claimant could perform the job of cook/dietary worker at Green Acres Development Center, earning $5.62/hr. Although Mr. Kramberg stated that Claimant would be expected to lift 20 lbs. repetitively, I find that based on the description of the jobs it is not credible that it would require lifting beyond Claimant's capabilities. Setting up and delivering trays to bed confined patients, as explained by Mr. Stanfill, as well as Mr. Kramberg's further description of dish-washing, cooking, and cleaning, allowing for designated breaks, are within Claimant's physical and intellectual restrictions. It is geographically available to Claimant and considers his capabilities and past employment history. Therefore, I find that as of May 6, 2003, Claimant was permanently partially disabled, with a wage earning capacity of $224.80.[21]

[20] As to the job at the Golden Corral in Jasper, TX, I find that it was unsuitable based on the distance Claimant would have been expected to commute. Therefore, I did not consider it when evaluating which of the proffered jobs was suitable alternative employment.

[21] The $5.62 per hour for 40 hours per week equals a weekly wage of $224.80.

Mindful, however, of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, 23 BRBS 330 (1990), Claimant's wages are adjusted to reflect their value at the time of Claimant's February 1999 injury. The National Average Weekly Wage (NAWW) for February 1999 was $435.88, and the NAWW for May 2003 was $498.27. Thus, the 1999 NAWW was approximately 87 % of the 2003 NAWW. Therefore, Claimant's 2003 wage earning capacity must be adjusted accordingly. Based on these adjustments, I find that Claimant has a residual wage earning capacity of $195.58.

In sum, Claimant was temporarily totally disabled due to his lumbar condition from April 29, 1999 through July 19, 1999 at which time he continued to be temporarily totally disabled due to his cervical condition until June 19, 2000 the date of maximum medical improvement for his cervical condition. Thereafter, he was permanently totally disabled until May 6, 2003 at which time due to the availability of suitable alternative employment with weekly wages of $224.80 he was and continues to be permanently partially disabled.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'd* 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curium) *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have

neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983).

According to Dr Esses and Dr. Haig, Claimant's cervical condition has reached maximum medical improvement with 0% impairment. Dr. Beaudry disagrees, and has stated that he would like Claimant to have a further cervical evaluation and treatment. According to Dr. Beaudry's interpretation of the cervical MRI (CX 3, p. 210) there was no evidence of disc herniation, central canal or forminal stenosis. However, the MRI did identify small anterior osteophystes at C5-6, of which both Dr. Haig and Dr. Esses were aware.

In spite of the unremarkable diagnostic findings, Claimant continued to have symptoms of cervical pain, and as such Dr. Beaudry believes that physiotherapy and/or epidural steroid blocks could treat Claimant's cervical condition, and relieve the pain, and therefore, are both reasonable and necessary (CX 2, p. 17).

Because Dr. Beaudry's concern seems to be based solely in Claimant's complaints of pain, and unsupported by diagnostic testing, I choose to credit the opinions of Dr. Esses and Dr. Haig over Claimant's subjective complaints of pain. Even noting the finding of the MRI, neither Dr. Haig, Dr. Beaudry's respected colleague, nor Dr. Esses a doctor specializing in spine surgery, felt that further treatment necessary. I agree with Dr. Haig and Dr. Esses and find that based on the diagnostic findings Claimant's injury has reached maximum improvement, he sustained no permanent impairment, and consequently, is in need of no further cervical treatment.

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation in a timely manner. Therefore, as Employer paid compensation within 14 days of learning of injury, no § 14 (e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from April 29, 1999, until June 19, 2000, the date of maximum medical improvement, based on an average weekly wage of $539.15;

(2) Employer/Carrier shall pay to Claimant compensation for permanent total disability benefits from June 19, 2000 until May 6, 2003, when suitable alternative employment was identified, based on an average weekly wage of $539.15;

(3) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits from May 6, 2003, and continuing, based on the difference between the average weekly wage of $539.15 and Claimant's residual wage earning capacity of $195.58[22];

(4) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's injuries of February 19, 1999;

(5) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(6) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

(7) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

[22] Subsections 8(c)(21) and 8(h) of the Act require that wages earned post injury, such as suitable alternative employment, be adjusted to the wage levels which that job paid at the time of the injury. *Richardson v. General Dynamics Corp*., 23 BRBS 327 (1990).

(8) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 23rd day of September, 2003, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:eam